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No. 90-1173

Supreme Court, U.S.
FILED
NOV 8 1991
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

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PUBLIC SERVICE COMPANY OF COLORADO
and R. M. RICHARDS,
*Petitioners,*

v.

WILLARD A. THOMPSON,
*Respondent.*

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**On Petition for a Writ of Certiorari to the Supreme Court of the State of Colorado**

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## REPLY TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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## REPLY TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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### INTRODUCTION

On April 22, 1991, the Court invited the Solicitor General to file a brief expressing the views of the United States in this case. On October 23, 1991, the Solicitor General filed his brief for the United States as Amicus Curiae (Amicus), recommending that the Petition for a Writ of Certiorari be denied. Due to a critical error in fact which forms the principal basis of the Amicus' position, this Reply is necessary.

## DISCUSSION

### I. CONTRARY TO THE CONTENTION OF THE AMICUS, THE DISCIPLINARY NOTICES AT ISSUE HERE WERE REQUIRED BY THE COLLECTIVE BARGAINING AGREEMENT.

The Amicus relies upon a fact assumed by it that the disciplinary notices at issue here were not required by the Collective Bargaining Agreement between the parties. (Amicus Brief at pp. 2, 3, 5 n.1, 7, 7 n.3, 8, 11 n.9, 13, 17). This single misapprehension of fact is the essential factor that drives the Amicus' position. This mistake is based upon an erroneous comment contained in the decision of the Colorado Court of Appeals that there was no evidence in the record that the Collective Bargaining Agreement required written notification. (Pet. App. 26a).[1]

From a review of the Colorado Court of Appeals' decision, it is clear that whether the disciplinary notices were required by the Collective Bargaining Agreement or not was irrelevant to that court's decision. (Pet. App. 26a). The Court of Appeals determined that even in the case where notices were not required by the Collective Bargaining Agreement, an absolute privilege still would be applied. (*Id.*) As such, the statement of the Court of Appeals that there is no evidence in the record that written notices were required by the Collective Bargaining Agreement is not a finding of fact, as the Amicus contends, but merely dicta.

Indeed, the Colorado Supreme Court was willing to assume, for purposes of its opinion, that the notices were required by the Collective Bargaining Agreement. (Ami-

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[1] Nevertheless, Amicus admits that at one point the Colorado Supreme Court was willing to assume, for the purposes of its analysis, that the statements were made in a grievance or disciplinary proceeding under a collective bargaining agreement. (Amicus Brief at p. 5 n.1).

cus Brief at p. 5 n.1). The reason that the Colorado Supreme Court was willing to consider such a fact is that the record before the Colorado Court of Appeals as well as the Colorado Supreme Court *did* contain unrebutted evidence that there was a requirement to provide written disciplinary notices to the Union pursuant to the Collective Bargaining Agreement. In an affidavit submitted in support of Public Service Company's Motion for Summary Judgment in the trial court and contained in the record before the Court at R. 36, ¶ 4, Gary Goodwin, Petitioner's Director of Labor Relations, stated:

> Public Service has a long standing policy of issuing written letters of reprimand and letters of suspension. There has also been a long standing practice and policy relating to bargaining unit employees, such as Plaintiff, that a copy of any discipline be sent to the Union. This practice is so well established as to constitute a post [sic] practice under the Collective Bargaining Agreement (Article 30). Failure to provide the Union with a copy of the written letter of suspension and the written letter of reprimand would have constituted a violation of the Collective Bargaining Agreement.

(Appendix A at p. 2a, attached hereto).[2] There is no evidence in the record which challenges this conclusion.

It is an elementary principle of labor law that in addition to the written provisions of a collective bargaining

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[2] This excerpt from the record will be part of the record before this Court should the Petition for a Writ of Certiorari be granted. Petitioners invite the Court, pursuant to Supreme Ct. Rule 12.5, to have the record transmitted at this juncture. Alternatively, this Court could grant the Petition subject to confirmation of the affidavit's inclusion. Should the mandatory effect of past practice between Petitioner and I.B.E.W. Local 111 as to the requirement that disciplinary notices be in writing not be borne out by the record, this Court could dismiss the Writ as improvidently granted. The Court should not deny this Petition for Writ of Certiorari based upon an erroneous understanding as to the facts involved in this case. This is particularly true when this fact plays such a dominant role in the Amicus' Brief.

agreement, past practices established by the parties' conduct may raise those practices to such a significance that they are incorporated in the collective bargaining agreement even though not specifically mentioned. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-582 (1960); *Strathmore Paper Co. v. United Paperworkers Int'l. Union, Local 197*, 900 F.2d 423, 428 (1st Cir. 1990); *Int'l. Bhd. of Elec. Workers, Local 1228 v. WNEV-TV*, 778 F.2d 46, 48-49 (1st Cir. 1985) (quoting *Warrior & Gulf*, 363 U.S. at 581-82, "industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it."), *cert. denied*, 476 U.S. 1182 (1986). *See also*, Elkouri and Elkouri, *How Arbitration Works*, (4th ed. 1985). Since the record in the court below shows that the disciplinary notices were required by the Collective Bargaining Agreement through the doctrine of past practice, the major reason for the Amicus' recommendation not to grant the Writ of Certiorari is no longer present.

## II. THE CONFLICT OF AUTHORITY THROUGHOUT THE LOWER COURTS REQUIRES GUIDANCE FROM THIS COURT.

Absent the factual error relied upon by the Amicus, it appears that the Amicus would favor review of this issue[3] The Amicus states:

> We recognize that some confusion exists in lower court decisions concerning the source and scope of privileges applicable to statements made during grievance hearings, arbitration, and other procedures pursuant to collective bargaining agreements. *Greater*

[3] The Amicus states that "we also do not believe that the judgment of the Colorado Supreme Court is in conflict with the judgment of any other court." (Amicus Brief at p. 14). As stated above, this conclusion is based solely upon an assumption by the Amicus that the disciplinary letters were not required to be in written form by the terms of the Collective Bargaining Agreement. (*Id.* at p. 17).

> *clarity in this broad area is plainly desirable.* (Emphasis added.)

(Amicus Brief at p. 8).

We believe that the confusion that exists in the lower courts is indeed greater than "some confusion," as evidenced by the long recitation of conflicting authorities by Petitioners in their Petition at pp. 13-16 and the Amicus in its Brief at pp. 12-13, 14-17 and the accompanying footnotes. However, while there may be a slight disagreement as to the extent of the confusion that exists in the lower courts, we do agree completely with the Amicus that "greater clarity in this broad area is plainly desirable." (Amicus Brief at p. 8).

*Textile Workers v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957), authorizes federal courts to fashion a body of federal common law involving federal labor policy to be applicable throughout the country. This is clearly necessary in this particular area, where courts over the years have been struggling with the issue of the privilege to be accorded disciplinary notices and statements made during grievance proceedings.[4]

The attempts of the Amicus to distinguish certain cases are not persuasive. The suggestion that the *Johnson v. Anheuser Busch, Inc.*, 876 F.2d 620 (8th Cir. 1989), and *Shane v. Greyhound Lines, Inc.*, 868 F.2d 1057 (9th Cir. 1989), were wrongly decided is not helpful, in that these cases definitely suggest that the Eighth and Ninth Circuits apply *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), in a manner inconsistent with Amicus' views as to what the law should be. This underscores the need for this Court to take and consider this matter, rather than letting this confusion continue. Also, it is quite clear that the Colorado Supreme Court decision

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[4] Indeed, the six months that the Amicus required to develop its position in this case is a reflection of the difficulty and the confusion that exist throughout the country at large.

here is directly contrary to *Hasten v. Phillips Petroleum Co.*, 640 F.2d 274 (10th Cir. 1981). It is intolerable to reasoned jurisprudence that within the same state the outcome of a case applying federal labor law may depend merely on whether a party can obtain jurisdiction in the federal courts rather than the state courts.

The determination of what type of privilege, whether absolute or qualified, exists in the context of grievance and arbitration proceedings is one for the Supreme Court. The Amicus offers its opinion that a qualified privilege should be applied nationwide. The Amicus states that, "*in our view*, there is no basis for petitioners' assertion that absolute protection for disciplinary statements in the workplace is necessary for grievance and arbitration mechanisms to work effectively." (Emphasis added.) (Amicus Brief at p. 14). On the other hand, Petitioners believe, and common sense dictates, that only an absolute privilege can effectively safeguard the free and open communication of parties to a collective bargaining agreement in matters of discipline. Nevertheless, this difference of opinion is not a reason for denying this Petition for Writ of Certiorari. Only after a full articulation of the views of the parties and any amici who may participate should this Court decide, pursuant to *Textile Workers v. Lincoln Mills*, the law to be applicable throughout the country in an area which has, based upon the cases cited by both Petitioners and the Amicus, confounded uniform application.[5]

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[5] The Amicus admits that there is no jurisdictional obstacle to review of this decision. (Amicus Brief, p. 17 n.17). Nevertheless, the Amicus contends that this matter could be reviewed after a full trial and presumably subsequent appeals through the Colorado Court of Appeals and the Colorado Supreme Court. (*Id.*) The Colorado Supreme Court's judgment is plainly final on this federal issue and is not subject to further review in the state courts. While Petitioners here may very well prevail at trial on the non-federal grounds, if the Colorado Supreme Court improperly applied the issue of privilege, there should be no trial at all. Moreover, if Petitioners do prevail at trial and make unnecessary further considera-

## CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Colorado.

Respectfully submitted,

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* *Counsel of Record*

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tion of this question, there would remain in effect the unreviewed decision of the State Supreme Court that disciplinary notices and statements made during grievance proceedings are only entitled to a qualified privilege rather than an absolute privilege. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 485 (1975).

# APPENDICES

# APPENDICES

## APPENDIX A

DISTRICT COURT
CITY AND COUNTY OF DENVER
STATE OF COLORADO

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Civil Action No. 84 CV 12173
Courtroom 2

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WILLARD A. THOMPSON,
*Plaintiff*,
v.
PUBLIC SERVICE COMPANY OF COLORADO, a Colorado corporation, and R.M. RICHARDS a/k/a R. MARK RICHARDS,
*Defendants.*

---

STATE OF COLORADO )
) ss.
CITY AND COUNTY OF DENVER )

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### AFFIDAVIT OF GARY GOODWIN

I, Gary Goodwin, being first duly sworn state as follows:

1. My name is Gary Goodwin. I am the Director of Labor Relations for Public Service Company of Colorado. I have responsibility for administration of all Collective Bargaining Agreements and advising authority in the imposition of discipline on all employee's bargaining units or otherwise. Unless otherwise indicated, I have personal knowledge of all of the following facts.

2. Public Service Company of Colorado has a Collective Bargaining Agreement with the International Brother-

hood of Electrical Workers (IBEW) Local Union No. 111 which covers operating, production and maintenance employees of the Company. Plaintiff is a member of that bargaining unit and is covered by the Collective Bargaining Agreement.

3. The Collective Bargaining Agreement gives Public Service the right to discipline employees for proper cause (Article 2, Section 1) subject to review in the grievance and arbitration procedures (Articles 27 and 28). The December 6, 1983 suspension and the June 29, 1984 written reprimand were subject to review in the grievance and arbitration procedure.

4. Public Service has a long standing policy of issuing written letters of reprimand and letters of suspension. There has also been a long standing practice and policy relating to bargaining unit employees, such as Plaintiff, that a copy of any discipline be sent to the Union. This practice is so well established as to constitute a post practice under the Collective Bargaining Agreement (Article 30). Failure to provide the Union with a copy of the written letter of suspension and the written letter of reprimand would have constituted a violation of the Collective Bargaining Agreement.

5. It is the usual policy of Public Service Company of Colorado's Supervisors when documenting any discipline, to send copies of such documentation to the disciplined employee's upper level supervisors, and to the Public Service Company's Labor Relations Department.

6. It is the policy of Public Service Company, which policy is in compliance with federal labor law, that whenever a bargaining unit employee is questioned and that questioning may lead to discipline, that a union steward be provided to represent the employee.

DATED this 13th day of October, 1986.

/s/ Gary Goodwin
GARY GOODWIN

Subscribed and sworn to before me this 13th day of October, 1986, by Gary Goodwin.

WITNESS MY HAND AND OFFICIAL SEAL.

/s/ Karen L. Harr
Notary Public

My commission expires: June 6, 1988.